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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921

No. [redacted]35

THE NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY

Petitioner

v.

DAVID FRUCHTER, an infant, by JENNIE FRUCHTER, his *Guardian ad litem*

Respondent

No. [redacted]36

THE NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY

Petitioner

v.

SAM FRUCHTER

Respondent

Respondents' Brief

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Supreme Court of the United States

OCTOBER TERM, 1921.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Petitioner, *v.* DAVID FRUCHTER, an infant, by JENNIE FRUCHTER, his Guardian *ad litem*, Respondent.	No. 237.
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Petitioner, *v.* SAM FRUCHTER, Respondent.	No. 238.

BRIEF FOR RESPONDENTS.

Statement.

These two actions, brought by father and son, were brought to this Court on writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit (fol. 474), and they are based upon certain personal injuries sustained by the son on June 9th, 1916, as a result of a severe electric shock

from a high-tension feed wire maintained by the petitioner, hereinafter referred to as defendant, on top of a public municipal bridge situated at 149th Street, in the Borough of Bronx, City of New York.

The bridge in question is a public thoroughfare described in the testimony as a municipal bridge freely open to the public without restriction. The exhibits which appear at the end of the transcript of record show more clearly than any written description the appearance and condition of the bridge. Situated in close proximity to the tenement district, where the plaintiffs lived, and immediately surrounded, as the photographs show, by unimproved and deserted lots, this bridge, with its steel beams studded with heavy bolts and its many columns of open trellis work, provided as tempting an allurement as might well be constructed for the small boys and children who naturally seek some playground in the free, open air, as near as might be to their homes.

The only part of this bridge maintained by the defendant is the apparatus on top, to which are attached the wires in question. This apparatus, as appears from the photographs, consists of a post or strut of open trellis work extending about six feet above the top of the bridge proper, and is repeatedly referred to by counsel and the various witnesses as a "superstructure." This strut, with its iron cross-arms and electric wires, was described by the witness Hoge Gilliam, an electrical engineer employed by the defendant, who had been connected with the defendant for thirteen years (fol. 402). He testified that the distance from the top of the bridge to the nearest wire suspended from this apparatus was only a short distance of about six feet (fols. 175, 179). He also

testified that if a person climbed up the strut to the iron cross-arms from which wires were suspended, the first wire such a person would meet, and evidently the one upon which the infant plaintiff was burned, is "a three-phase wire. That is, a power wire, * * * used for furnishing propulsion current to operate the trains" (fol. 178). This wire carried a voltage of approximately eleven thousand (11,000) volts (fol. 403), and the space from the steel strut to the wire is nineteen and one-half inches (fol. 179). The wires as shown by the photographs were attached to porcelain insulators, but it is conceded that the wires were not otherwise insulated or protected.

The testimony of the witnesses produced both by the plaintiffs and by the defendant indicates that for many years prior to the accident to the infant plaintiff, crowds of boys from the nearby tenement district played about the bridge, climbing up on the trellis work and on the broad batter posts and ran helter-skelter over all parts of the bridge, including the top, playing tag, follow-the-master and other childish games and searching for birds' nests and eggs. The testimony of the witnesses for both sides indicates beyond any question that boys on repeated occasions climbed and played not only about the top of the bridge, but into and upon the very strut upon which the defendant's wires were suspended, and where the infant plaintiff was injured.

Among those who had actually climbed upon the strut or superstructure, as it was called in the testimony, are Joseph Atrazzo (fols. 188-9), Leon Posner (fols. 231-2), and Max Glaser (fol. 240). Six of these small boys were called as witnesses by the plaintiffs and they testified that they

had for a long time used the bridge as a playground and that they did not know that the wires suspended from the strut were charged with electricity (fols. 227, 190, 223, 242). The defendant produced as witnesses several patrolmen and other employes in its service at the time of the accident and on cross examination they significantly admitted that they had on many occasions observed the boys using the bridge and the superstructure as a playground and the defendant's witness, James J. Byrnes, even admitted that he saw the children playing and climbing so near the wires that he "knew they were going to get burned" (fols. 383, 384).

The defendant's witness, Edward McNally, employed by the defendant as a patrolman in its Oak Point Yard, which included this bridge itself (fol. 366), testified that he had seen the children climbing around the bridge so many times that he "couldn't remember" (fol. 368), that the "little tots" whom he saw climbing in all parts of the bridge "ranged from five years to seven and eight years old" (fol. 369). He testified that he was afraid the boys would get hurt and that they gave him more trouble than the men around the yard (fols. 369-70).

Another one of the defendant's patrolmen, Antonio Posci, who had been in the employ of the defendant since 1905, observed the boys playing about the bridge on many occasions, but added that they were so small that he did not want to arrest them (fol. 359), that the majority of them were "little fellows" (fol. 361), and that "many a time I took them home to their mothers" (fol. 361). This witness also admitted (fol. 363):

"Q. And did you ever report to your supe-

riors that little fellows were climbing this bridge? A. Yes, sir.

"Q. You are sure you did? A. Positively.

"Q. How many times? Many times? A. Yes, sir. * * *

"Q. Did you make those reports orally or in writing? A. *Well, in the case of the wires, I make it in writing,* in the case of taking the boy home, I explained the matter to the captain."

As to the signs referred to on page 8 of the petitioner's brief, the infant plaintiff gave uncontradicted testimony to the effect that at the time of the accident he could not read (fols. 276, 298), and that he did not understand anything about the wires (fol. 270). Moreover, as to the existence of the signs, the testimony at the trial was clearly conflicting (plaintiff's evidence, fols. 156, 161, 279; defendant's evidence, fols. 329, 344, 352), and the photographs, which show the signs on top of the bridge, were concededly taken after the accident.

There was also ample proof that it was practicable and feasible to construct some mechanical apparatus which would entirely protect the live wires suspended upon these struts and thus avoid injury to the small boys playing about the top of the bridge from injury (fols. 204-5, 416-7).

In view of the very clear and comprehensive statement of facts contained in the opinion of the learned Circuit Court of Appeals herein, the above brief summary of the facts would have been omitted but for the claim asserted on page 9 of the petitioner's brief that the defendant had no notice of the fact that the boys had climbed upon its strut or superstructure, in contradistinction to the

bridge itself, which was owned by the City of New York.

There was ample if not overwhelming evidence to indicate the most complete notice by the defendant not merely of the fact that the boys in great numbers habitually used the bridge as a playground, but also of the fact that upon occasions and not infrequently the boys climbed up upon the very struts from which the live wires of the defendant were suspended.

Outline of Argument.

1. The plaintiffs' position in these cases is that since the live wire from which the infant plaintiff received his injuries was maintained by the defendant over a public highway attached to a municipal bridge, the defendant's liability is governed by those rules of law applicable to persons maintaining a dangerous thing in or adjacent to a public highway.

   (a) Whatever doubts have been cast upon the so-called attractive nuisance doctrine when applied to dangerous things kept upon *strictly private property*, the overwhelming weight of authority supports the application of the doctrine to dangerous instrumentalities maintained in or adjacent to a public highway.

   (b) Defendant's contention that the wire in question was on its own private premises is contrary to the conceded facts as stated in its own brief.

2. Even if it were true, as erroneously asserted by defendant, that the wire was on its own premi-

ses, the plaintiffs are entitled to recover because under the decisions of this Court the so-called attractive nuisance doctrine is nevertheless applicable.

(a) This doctrine, so far as the United States Courts are concerned, is nothing more than a phase of the broader doctrine of negligence and the term "nuisance" is a misnomer.

(b) The immunity accorded by the common law to land owners against liability for injuries negligently caused adult trespassers or infant trespassers of sufficient maturity to appreciate the dangers to which they are exposed is not accorded land owners as against trespassing children of tender years who are lured upon the premises by an attraction visible from the public highway in which children are in the habit of playing. In the latter case the landowner is under a duty to take *reasonable* precautions to avoid *probable* injuries which, in the instant cases, the defendant failed to do.

(c) It is not plaintiffs' contention that defendant is an insurer against injuries caused such children trespassing upon its premises. The defendant's duty to take preventive action is predicated upon *notice* of facts which would warn a reasonable man that such injuries are likely to occur. Furthermore the extent of defendant's duty after notice is not unlimited, but merely requires that such precautions be taken as are *reasonable under the circumstances*. In the instant cases there was evidence that defendant not only had notice

of the danger but that the defendant might by a simple and inexpensive device, which would not interfere with the use of its property, have removed the danger to the infant plaintiff and numerous other children who defendant knew were constantly playing about its live wire. Whether defendant had discharged its duty under the circumstances was a question for the jury and its verdict, which was unanimously affirmed by the Circuit Court of Appeals, is conclusive on this point.

3. The plaintiffs further contend that it was not necessary for them to prove that defendant's wire, as distinguishable from the City's bridge and defendant's strut, was alluring to children. It is sufficient that the defendant maintained a dangerous wire in close proximity to something which was alluring to children or in close proximity to a place where defendant knew, or should have known, children were likely to be. Assuming that the control of the bridge proper was in the City, this did not in any way prevent the defendant from taking reasonable steps to keep children from coming in contact with its wires.

4. Section 93 of the Railroad Law of New York, claimed by defendant to limit its duty to the public with reference to the frame work of the bridge, is inapplicable. Section 93 of the Railroad Law merely deals with the duty of the defendant as to the maintenance of the bridge *per se* and has nothing to do with the duty of the defendant with reference to the maintenance of live wires attached to the bridge.

5. It is well settled that the question of lia-

bility for negligence, if not modified or regulated by statute, is one of general common law and the Federal Court is not bound to follow the decisions of the State Courts. Furthermore the decisions of the New York Courts sustain a recovery by the plaintiffs in the cases at bar in view of the fact that defendant's wire was over a public highway.

ARGUMENT.

FIRST POINT.

The defendant's liability is governed by those rules of law applicable to persons maintaining a dangerous thing in or adjacent to a public highway.

The defendant begins its argument by attempting to distinguish the cases at bar, which defendant states were tried upon the so-called attractive nuisance doctrine, from cases where one is carelessly maintaining a dangerous thing upon the premises of another or in the public highway or adjacent thereto. *In the latter type of case defendant concedes liability for injuries thus caused either a licensee or a trespasser* (Petitioner's brief, p. 12), but defendant states that the instant cases raise the question whether defendant was under any affirmative duty to an infant trespasser of tender years injured by the inherently dangerous instrumentalities maintained on its own premises (Petitioner's brief, p. 13).

It is difficult to understand why defendant should make this statement in view of the facts as set forth on page 6 of its brief, that the infant's action was brought to recover for personal in-

juries sustained from contact with the defendant's electric wire *"attached to the top of the superstructure of a highway bridge in the City of New York, carrying 149th Street over defendant's right of way."* Throughout its brief, defendant refers to this bridge as "The City's property," or "City's Bridge" (See Petitioner's brief, pp. 9-11).

In view of these facts, how is it that these cases "do not involve the duty from the owner of a dangerous instrument, carelessly maintained on the premises of another to a licensee or even trespasser injured thereon"? (Petitioner's brief, p. 12). How is it that "the instant cases do not fall within the class of cases recognizing liability for dangerous conditions or instrumentalities maintained or left in a public place or adjacent thereto"? (Petitioner's brief, p. 13.) Indeed the defendant cites as an example of the type of case in which defendant concedes liability, *Consolidated Electric Light Co.* v. *Healy*, 65 Kan., 798, 70 Pac., 884, where, as in the instant cases, defendant was carelessly maintaining a live wire on a public bridge (Petitioner's brief, pp. 12-13), but defendant suggests that because the cases at bar were tried upon the attractive nuisance doctrine instead of being tried upon some other and more appropriate theory, which defendant does not define, plaintiffs are not entitled to recover.

Just what defendant considers the attractive nuisance doctrine to be is hard to comprehend in view of this subtle distinction which it seeks to draw. It is believed, however, that either the defendant has misconceived the doctrine or else in its attempt to escape the consequences of unfavorable decisions, it has unwittingly admitted its liability in the cases at bar.

The fact that the defendant's wire from which the infant plaintiff received his injuries was being maintained over a public highway, and was not on strictly private property, is too clearly established by the evidence to be open to serious question.

While a number of State Courts have been reluctant to adopt the wise and salutary rule of policy announced by this Court in the case of *Railroad Company* v. *Stout* (1873), 17 Wall., 657, in so far as negligent land owners were rendered liable for injuries sustained by children trespassing upon strictly private property, as in the *Stout* case, the overwhelming weight of authority supports this policy when applied to persons carelessly maintaining a dangerous instrumentality in or adjacent to the public highway. *Snare & Triest Co.* v. *Friedman* (1909), 169 Fed., 1, certiorari denied by this Court, 214 U. S., 518; *The Consolidated Electric Light Co.* v. *Healy*, 65 Kan., 798, 70 Pac., 884; *Temple* v. *McComb City Electric Light & Power Co.* (1907), 89 Miss., 1, 42 So., 874; *Ft. Wayne Northern Indiana Traction Co.* v. *Stark* (1920), 127 N. E., 460; *Williams* v. *Gas & Electric Co.* (1918), 274 Mo., 1; *Robertson* v. *Light & Power Co.*, 187 App. Div., 720; *Chesko, et al.* v. *Delaware & Hudson Co.* (1914), 218 Fed., 804; *Lynch* v. *Nurdin*, 1 Q. B., 29.

Even in jurisdictions like New York, where the doctrine of the *Stout* case has been declared inapplicable to injuries received by trespassing children upon *strictly private property*, *Walsh* v. *Fitchburg Railroad*, 145 N. Y., 301, recovery has been permitted where, as in the case at bar, defendant was carelessly maintaining a live wire over a public highway. *Robertson* v. *Light & Power Co.*, 187 App. Div., 720.

Moreover, as will hereinafter be shown, even if it were true, as erroneously asserted by defendant, that the wire in question was technically upon its own premises, its close proximity to the public highway, attached to a municipal bridge, where defendant knew children were in the habit of playing and were likely to be injured unless the wire were guarded, clearly brings the case within the doctrine of this Court first announced in *Railroad Company* v. *Stout* (1873), 17 Wall., 657, approved in *Union Pacific R. R. Co.* v. *McDonald,* 152 U. S., 262, and recently explained in *United Zinc & Chemical Company* v. *Britt,* decided March 27, 1922, but not yet reported.

SECOND POINT.

Upon the decisions of the Federal Courts, the defendant was under a legal duty to take reasonable steps to guard against injuries to children of tender years which were likely to occur because of the close proximity of the live wire to a place and structure alluring to children and about which, well known to the defendant, young children were in the habit of playing.

I.

While the common law imposed upon a land owner no duty to maintain his premises in a safe condition as against adult trespassers, but at most a duty not to intentionally or wantonly inflict harm upon them, according to many cases, or to avoid harming the trespasser whose presence was known by negligent acts which resulted in actually bringing force to bear upon his person, according to

other cases, this Court recognized at an early date that the duty towards trespassing children of tender years was of much greater scope.

In *Railroad Company* v. *Stout* (1873), 17 Wall., 657, this Court held that the defendant was liable for injuries sustained by a child six years of age while playing upon a turntable maintained unlocked on the defendant's premises, near a road without visible separation, where the evidence showed that children had been in the habit of playing upon the turnable, notwithstanding the child was technically a trespasser at the time of the injury.

In the recent decision of this Court in *United Zinc & Chemical Company* v. *Britt*, decided March 27, 1922, Mr. Justice Holmes, in stating the basis of the decision in the Stout case, declared:

> "In *Railroad Company* v. *Stout*, 17 Wall., 657, the well-known case of a boy injured on a turntable, it appeared that children had played there before to the knowledge of the employees of the railroad, and *in view of that fact and the situation of the turntable near a road without visible separation*, it seems to have been assumed without much discussion that the railroad owed a duty to the boy. Perhaps this was as strong a case as would be likely to occur of maintaining a known temptation, where temptation takes the place of invitation. A license was implied and liability for a danger not manifest to a child was declared in the very similar case of *Cooke* v. *Midland Great Western Ry. of Ireland* 1909 A. C., 229." (Italics ours.)

Since the decision in *Railroad Co.* v. *Stout*, scores of cases have been decided, both in the State and Federal courts, following the doctrine there laid down. While the courts in some States have

taken issue with the doctrine altogether, and others have limited it to dangerous things and situations maintained upon or contiguous to public highways, the doctrine has been repeatedly affirmed by the Federal courts and a majority of the state courts as applicable to things dangerous to children maintained unguarded upon strictly private property, as well as upon the public highway, where, as pointed out by this Court in the *Britt* case, *supra*, the allurement or attraction is visible to children playing in a public highway or other place where they have a right to be. As aptly stated by Mr. Justice Holmes in that case:

> "• • • While it is very plain that temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult."

See on this point the following cases:

Union Pacific R. R. Co. v. *McDonald*, 152 U. S., 262; *American Ry. Express Co.* v. *Crabtree*, 271 Fed., 287; *Chesko et al* v. *Delaware & Hudson Co.*, 218 Fed., 804; *Coeur d'Alene Lumber Co.* v. *Thompson*, 215 Fed., 8; *Hardy* v. *Missouri Pacific R. R. Co.*, 266 Fed., 860; containing a review of the State and Federal authorities.

The general doctrine commonly called the "turntable" or "attractive nuisance" doctrine has been explained by different Courts upon various theories. Some Courts have said that one who maintains upon his premises a thing or situation dangerous and alluring to children of tender years thereby impliedly invites them to come upon his

land and thus the general rule of non-liability to trespassers is sought to be avoided. Other Courts have declared that one maintaining upon his land a thing or situation dangerous and alluring to children of tender years is maintaining a "trap" and thus the case is brought within the rule that one is under a duty not to wilfully or wantonly injure a trespasser. Still other Courts have taken the position that a child of tender years is incapable of being a trespasser. But whatever may be the correct explanation of the doctrine, its essentials have been tersely and succinctly stated by the Circuit Court of Appeals, 8th Circuit, in the case of *Hardy* v. *Mo. Pacific Rd. Co.* (1920), 266 Fed., 860, at page 863, in the following language:

> "The essentials of the doctrine we deem to be, first, that the owner negligently maintains an agency which he knows or should know would be dangerous to children; second, that such agency is maintained at a place where the owner knows or should know children are likely to resort or to which they are likely to be attracted."

The essence of the doctrine is that it is not unlikely that children will come in contact with and be injured by the dangerous thing or situation, and that the defendant knew or should have known that such consequences were likely to result. Under these circumstances the law imposes a duty upon the one maintaining the dangerous thing or situation to take *reasonable* steps to prevent and guard against such consequences. The failure to employ reasonable means of prevention is negligence and for the resultant consequences the delinquent party is made responsible.

That this is the true basis of the doctrine is con-

firmed by the statement of the Circuit Court of Appeals, 2nd Circuit, in the case of *Heller v. N. Y., N. H. & H. R. R. Co.*, 265 Fed., 192, on page 198:

> "If the defendant ought reasonably to have anticipated that children would be likely to resort to this particular place to play, and, if they did, that they would be likely to be injured, it was guilty of negligence in maintaining the place in its exposed state. It is sufficient to authorize a recovery in cases of this nature if it appears that cautionary measures of a reasonable character would have prevented the injury complained of, and that such measures were not taken by the defendant. * * * Where there is uncertainty as to the existence of negligence, whether the uncertainty arises from the conflict in the testimony, or whether, the facts being undisputed, fair-minded individuals can honestly draw different conclusions from them, the question is for the jury."

See also the statement by that Court in its opinion affirming the judgments for the plaintiffs herein (fols. 464-5), as follows:

> "Since, so far as the Courts of the United States are concerned, these cases are all assumed to rest on *Railroad Co.* v. *Stout*, 17 Wall., 657, the word 'nuisance' is inappropriate. A nuisance is that which 'unlawfully worketh hurt, inconvenience or damage,' and neither the turntable of the Stout case nor the electric wire here to be considered was a nuisance; both were lawful enough. But many a lawful thing may be so negligently managed, handled or maintained as to give rise to causes of action in tort. The true doctrine is that any composition of matter which lures or attracts the confiding ignorance of child-

hood to its own harm must be safeguarded as circumstances require—and of course the circumstances vary in almost every instance."

II.

It is not plaintiffs' contention that defendant is an insurer against injuries caused such children trespassing upon its premises. The defendant's duty to take preventive action is predicated upon *notice* of facts which would warn a reasonable man that such injuries are likely to occur. Accordingly in the case of *United Zinc & Chemical Company* v. *Britt, supra,* since the pool which had formed on defendant's land was well within private property and was not visible from the highway or other place where children might reasonably be expected to be, nor, as stated by this Court, did it appear that children were in the habit of going to the place, the doctrine of the Stout case was declared inapplicable. Similarly in the case of *Hardy* v. *Missouri Pacific Railroad* (1920), 266 Fed., 860, since there was no evidence which tended to show any likelihood of children reaching the place of danger, the Court affirmed a directed verdict in favor of the defendant, declaring, at page 863:

"'Anticipation,' in the meaning of this doctrine, means probability, not possibility."

Likewise in the case of *Heller* v. *N. Y. N. H. & H. R. R. Co.* (1920), 265 Fed., 192, the Court sustained a verdict for defendant because on the evidence, as stated by the Court, the plaintiff's "extraordinary act was not one that defendant could be expected to have foreseen and which it could have anticipated."

The difference between the cases at bar and the

Britt, Hardy and *Heller* cases, referred to above, is, that in the instant cases the defendant had ample notice of the danger of its unguarded wire to young children which defendant knew were in the habit of climbing and playing upon the superstructure of the bridge within a few feet of its wire, and, therefore, was charged with notice that the injuries sustained by the infant plaintiff were likely to occur at any time, whereas, in the *Britt, Hardy* and *Heller* cases there was no evidence from which the jury could reasonably infer that an injury to children was probable. As stated in the opinion of the Circuit Court of Appeals herein (fols. 465-6):

> "That it was dangerous was too obvious for argument, and therefore if the danger was known and the temptation to children also known, and known to the defendant, it was a question for the jury to declare whether the absence of guards either human or mechanical did not constitute negligence.
>
> "This is the substance of our ruling in the Heller case, *supra*, where, as may be noted, the verdict of the jury had negatived negligence.
>
> "Whether a jury issue is presented in any given case depends upon a multitude of circumstances; we said in the Heller case that the plaintiff's 'extraordinary act was not one that defendant could be expected to have foreseen and which it could have anticipated' (p. 199). Considering the evidence in this case we conclude that there was evidence from which the defendant could have foreseen that some boy would in a spirit of bravado do exactly what this boy did, and under the Stout case just such troublesome boys are entitled to be protected against themselves."

III.

Furthermore the extent of defendant's duty after notice is not unlimited, but merely requires that such precautions be taken as are *reasonable under the circumstances.* As said by Mr. Justice Holmes in the *Britt* case, *supra,* "The doctrine needs very careful statement not to make an unjust and impracticable requirement." In determining what precautions may be reasonably exacted of a defendant, due consideration should be given to the feasibility of guarding against a particular danger. Thus the insulation of a power wire might not be an unreasonable requirement, whereas the insulation of a trolley wire or third rail would be an unreasonable requirement, because as a practical matter trolley wires and third rails cannot be insulated. This distinction is suggested in a recent decision by the Court of Appeals of New York, in *Adams* v. *Bullock* (1919), 227 N. Y., 208, at page 211, where Cardozo, J., states:

> "There is, we may add, a distinction, not to be ignored, between electric light and trolley wires. The distinction is that the former may be insulated. Chance of harm, though remote, may betoken negligence, if needless. Facility of protection may impose a duty to protect. With trolley wires, the case is different. Insulation is impossible."

It is upon this ground that cases like *Dickinson McAllister* v. *Henrich Jung,* 112 Ill. App., 138, relied upon by defendant (Petitioner's Brief, p. 17), may be explained. In that case the plaintiff, a boy, climbed defendant's elevated railway structure on which its elevated trains were operated by a bare third rail in the City of Chicago in quest of a ball

and was injured by coming in contact with the third rail. Furthermore the Court expressly stated in its opinion in that case, at page 141, "we find in the record no evidence tending to show that boys had been in the habit of climbing or playing upon the elevated structure."

For the same reason the case of *Reidel* v. *West Jersey Railroad*, 177 Fed., 374, relied upon by the defendant (Petitioner's brief, p. 16), is distinguishable. The facts were that the plaintiff's child had gone upon the defendant's tracks to pick flowers and there came in contact with an electric third rail. It appeared in that case that the Railroad Company had fenced its right of way in compliance with the statutes of the state and there was no evidence in the case to charge the defendant with notice that the place where the accident occurred was one which had been or was likely to be frequented by children. Further requirements would be both impracticable and unreasonable. The following passage from the Court's opinion, page 378, explains the decision:

> "There is nothing in the record to bring this case within the *ratio decidendi* of the so-called 'turntable' cases, and other cases decided on the same principle, to which the plaintiff refers. In the present case the railroad property was guarded by a statutory fence and the gate through which the plaintiff and his companion entered upon the railroad premises was fastened with a bolt, which had been withdrawn by them. There is no evidence that there was anything to allure or entice children to go upon the railroad premises at the place where the accident occurred, and none that children had ever been in the habit of entering upon the railroad premises through this

gate, or otherwise, for play or amusement, or for any other purposes."

In the case of *Erie R. R. Co.* v. *Hilt* (1917) 247 U. S., 97, relied upon by defendant (Petitioner's brief, p. 16), it appeared that a statute of New Jersey, where the accident occurred, precluded a recovery. Of course it is not denied that the Federal Courts must respect such statutes. See *Snare & Triest Co.* v. *Friedman*, 169 Fed., 1. Furthermore the facts in the *Hilt* case were that the child ran on to the defendant's railroad track to get a marble which the child had caused to roll under one of the defendant's cars. There was no evidence that the defendant was maintaining a dangerous thing or situation alluring to children or in close proximity to something which was alluring to children, or that children were in the habit of playing on the tracks or that it was likely that the child would do what the deceased did in that case.

In the case of *New York Central & H. R. R. Co.* v. *Price*, 159 Fed., 330, cited by defendant (Petitioner's brief, p. 16), the facts were practically the same as in the *Hilt* case. The child struck its plaything so that it fell on the track and ran after it on the defendant company's land where he was struck by a freight train. The Court merely decided that there was no duty on the part of the railroad company to fence its right of way and there was no evidence of negligence on the part of the carrier.

In the case of *National Metal Co.* v. *Agostini* (1919), 258 Fed., 109, relied upon by defendant (Petitioner's brief, pp. 16, 25), it appeared that a child, playing in the highway, threw a stick upon the ice in a nearby canal maintained by the de-

fendant. The child ran onto the ice and while attempting to recover the stick fell into a hole and was drowned. The Court said there was no evidence that children had been in the habit of playing on the ice or about the canal. Furthermore defendant was not negligent in failing to fence the canal. Such requirement would be unreasonable.

As above pointed out, the so-called attractive nuisance doctrine does not require that the defendant shall guard against injuries to children at whatever cost. The extent of the duty is limited to the taking of those precautions which it would be reasonable to require under the circumstances. Indeed the limits to every duty must be determined upon this basis. Accordingly the courts have generally held that, in the absence of statute, a railroad is under no duty to fence its tracks and yards against children who might be tempted to go upon its right of way to recover a plaything or to satisfy some other desire. Such a requirement would be unreasonable. Likewise it would be unreasonable to require one to fence a canal or pond or wall because, as stated in *McCabe* v. *American Woolen Co.* (1903), 124 Fed., 283, if a land owner is to be held for not especially guarding such objects, then the customs of the community must be changed throughout, because it is impossible to distinguish a canal from a river or a brook, a hay mow, an ox cart left in a farmer's yard, a high ledge or a field trench, about either of which children may be in the habit or accustomed to play. It is upon this basis that the following cases cited by defendant (Petitioner's Brief, at pages 17, 18, 19) were decided: *Papich* v. *Chi., M. & St. P. Ry Co.*, 167 N. W., 686; *Smalley* v. *Rio Grande Western Ry.*

Co., 98 Pac., 311; *Compton et al.* v. *Mo. Pac. Ry. Co.*, 126 S. W., 821; *Colby* v. *Chic. Jct. Ry. Co.*, 216 Ill. App., 315; *Blough* v. *Chic. Great W. R. Co.*, 179 N. W., 840; *Polk* v. *Laurel Hill*, 174 Pac., 414; *Troglia* v. *Butte Co.*, 270 Fed., 75; *Fusselman* v. *Yellowstone Valley Land & Irrigation Co.*, 163 Pac., 473; *Hageage* v. *District of Columbia*, 42 App. D. C., 109; *Coon* v. *Ky. R. R.*, 173 S. W., 325; *Heva* v. *Seattle School District No. 1*, 188 Pac., 776.

That the danger lurking in an uninsulated wire charged with a high voltage of electricity is not so patent, obvious and notorious as to bring the case within the principle of the above cited cases is shown not only by the numerous cases where children have been allowed to recover for injuries due to coming into contact therewith, but also by cases where adults have been permitted to recover for injuries occasioned in this manner. See *Braun* v. *Buffalo Electric Company* (1911), 200 N. Y., 484.

In the cases of *Kalman* v. *Cohen*, 203 Ill. App., 597; and *Hendricks* v. *Kans. So. Ry.*, 77 So., 130 (Petitioner's Brief, p. 17), the decisions were expressly placed upon the ground that defendant's pile of rags in the former case and defendant's turntable in the latter case were not the proximate cause of the injury.

The following cases, cited by defendant but not discussed (Petitioner's Brief, pages 17, 18, 19), are all distinguishable from the cases at bar, because in each case the Court pointed out there was no evidence of negligence upon the part of the defendant: See *Meyer* v. *Union Light, Heat & Power Co.*, 151 S. W., 941; *Fincher* v. *Chi., R. I. & P. Ry. Co.*, 78 So., 433; *Johnston* v. *New Omaha Thompson Houston Elec. Lt. Co.*, 110 N. W., 711; *Nichol* v. *Bell Tel. Co.*, 109 Atl., 649; *Louisville R. R. Co.*

v. *Ray*, 134 S. W., 858; *Texas Ry. Co.* v. *Garcia*, 216 S. W., 1108; *Sheffield Co.* v. *Morton*, 49 So., 772; *McDermott* v. *Burke*, 256 Ill., 401; *Simonton* v. *Citizens' Elec. Light & Power, et al.*, 67 S. W., 530; *Mayfield* v. *Webb*, 111 S. W., 712.

In the case of *Taylor* v. *Minneapolis & St. L. R. Co.*, 163 N. W., 405, cited by defendant (Petitioner's Brief, page 18), a verdict and judgment in favor of the plaintiff was affirmed on appeal. The plaintiff was injured while playing on the defendant's turntable, and the Appellate Court declared that whether it was negligence upon the part of the defendant to leave the turntable unguarded or unlocked was a question for the jury, and the jury's verdict was conclusive. Certainly this case is in full accord with the contentions of plaintiffs herein.

In the instant cases there was ample evidence that defendant not only had notice of the danger, but there was evidence that defendant might by a simple and inexpensive device, which would not interfere with the use of its property, have removed the danger to the infant plaintiff and other children whom defendant knew were constantly playing about its live wire. Whether the defendant had discharged its duty under the circumstances was a question for the jury, and its verdict, which was unanimously affirmed by the Circuit Court of Appeals, is conclusive on this point. See comment in 21 Columbia Law Review 724 approving the decision of the Circuit Court of Appeals herein.

THIRD POINT.

It was not necessary for the plaintiffs to prove that the structure and wire maintained by the defendant, as distinguishable from the city's bridge and defendant's strut, was alluring to children. It is sufficient that the defendant maintained a dangerous wire in close proximity to something which was alluring to children or in close proximity to a place where defendant knew, or should have known, children were likely to be attracted.

While in many of the so-called "attractive nuisance" cases the dangerous thing or situation maintained by the defendant was also attractive or alluring to children, this fact was a mere circumstance of the particular cases, and not essential to the plaintiffs' right to recover. It should be remembered that the basis of the defendant's liability is negligence. The negligence consists of a failure to take reasonable precautions to avoid injuries to children of tender years likely to result because of the maintenance of the dangerous thing or situation at a place where the defendant knew, or should have known, children were likely to be attracted. The probability of the child's coming in contact with the danger may be based upon the alluring character of the dangerous thing, or upon its close proximity to a place or thing alluring to children, or upon its close proximity to a place where the defendant knows children are in the habit of playing.

The question has been several times before the courts in States which have followed the doctrine

of *Railroad Co.* v. *Stout*, and in each instance the point has been resolved in favor of the plaintiff.

In the case of *The Consolidated Electric Light Co.* v. *Healy* (1902), 65 Kan., 798, 70 Pac. 884, the facts were strikingly similar to the cases at bar. Briefly stated, the facts were that the defendant Power Company was given permission by the city of Kansas City to carry its electric wires on a viaduct constituting a part of one of the streets. This the company did, by stringing them on timbers projecting out of the side of the viaduct or bridge. The sides of the bridge were guarded by a high railing or balustrade several feet high, running, substantially speaking, over the ends of the boards constituting the bridge floor. The electric wires alongside the viaduct were defectively insulated, their insulation covers having rotted away in many places. This fact the company knew. Small boys were in the habit of climbing over the viaduct railing and going dangerously near the electric wires. This fact the company also knew. A boy about ten years old climbed over the railing and came in contact with one of the electrically charged wires and was killed. According to the evidence, it appeared probable that the moment before he had been standing, or, rather, moving about, on the projecting ends of the bridge boards or the projecting wire supports. Suit was brought by his parents to recover damages for his death. Judgment was rendered in their favor in the court below, and the defendant appealed. The decision of the Court in this case has such an important bearing upon the rights of the plaintiffs in the cases at bar that the opinion of the Court is here set forth at length. Beginning at page 800, the Court said:

"The matter principally discussed is the question of the company's liability under the circumstances stated. As to the boy, who was not at the time on the highway proper, but who was engaged in a dangerous sport immediately outside of it, was the Company negligent in maintaining its wires in an uninsulated condition where he was liable to come in contact with them? To our minds there can be no doubt as to the answer. It was liable. To an adult it might not have been. To a small boy in the buoyancy of sport and lacking the intelligence, and discretion of older years, it was liable, in view of the fact that it knew that children of this class were in the habit of venturing in dangerous proximity to its negligently kept wires.

"The place where the boy met his death was one of those denominated in the books 'attractive nuisances,' the keepers of which according to those decisions which we regard as the sounder exposition of the law, are liable to one who, without inculpating fault on his part, is injured thereby. *It is true the Company did not maintain the bridge and the railing and the elevation above ground, constituting an attractive climbing-place for boys, and it may be that its wires were not themselves attractive playthings for the boys, but it maintained them in such immediate proximity to that which was attractive as to constitute them an integral part of the whole. It put its wires within the attractive environment. It identified itself in that way with the attractive place. If one maintains a dangerous instrumentality on his own premises immediately against the premises of another, and within the sphere of the attractive influence of something on the latter, and a third one, venturing on the latter, is injured by coming in contact with the former, he would seem entitled to a recovery; that is, assuming the necessary*

knowledge to charge the derelict party. The Electric Company had knowledge of this case. Its counsel attempted to explain that it had not, but it had. We have gone carefully through the evidence, and are convinced. * *

"It is immaterial that the viaduct railing and the elevation above ground may not have been dangerous. They probably were, but for reasons peculiar to themselves. The boy did not come to his death because of dangers incidental to the mere act of climbing. *Nor is it material that the Company's wires were not attractive. The attractions of the viaduct railing as a place for sport and the defectively insulated wires as instrumentalities of danger are united together as a whole.* We assume that the City is not liable, but, if it were charged with liability, it would be no answer to it to say that it did not furnish the element of danger. It would be sufficient to reply that it furnished the attraction to entice into danger. When the Company answers that it did not furnish the attraction, it is sufficient to reply that it furnished the danger to combine with the attraction. It could have neutralized the harmful ingredient of attractiveness in the compound by guarding against the danger, and to require it to do so, is not to impose upon it any greater burden than though it were responsible for both the hurtful constituents." (Italics ours.)

In the recent case of *Ft. Wayne & Northern Indiana Traction Co. v. Stark* (1920), 127 N. E., 460, decided by the Appellate Court of Indiana, the same question was presented. In that case it appeared that the defendant Company which was engaged in the business of furnishing, for profit, electricity for lighting and power purposes to the inhabitants of the City of Fort Wayne, had strung one of its wires so that it passed through the

branches of a tree located on private property, but very near the street; and at the point where the wire passed through the branches of the tree, the insulation had been, for at least two years prior to the accident, defective. The tree was located in a neighborhood where defendant knew that numerous children were in the habit of congregating and playing. The plaintiff, a child nine years of age, climbed into the tree, and thus came in contact with the wire and was thereby injured. The trial by jury resulted in a verdict and judgment for the plaintiff. On an appeal by the defendant the Court said (p. 460):

> "The one question involved in this appeal is whether or not the facts, as above stated, show actionable negligence on the part of appellant.
>
> "(1) Electricity is a dangerous force, and it is well established that Companies engaged in its generation and distribution, while not liable as insurers, to those who may come in contact with current carrying wires, are required to exercise reasonable care to keep such wires safely insulated. City of Decatur *v.* Eady, 186 Ind., 205, 115 N. E., 577, L. R. A., 1917; Denver Consolidated Electric Co. *v.* Simpson, 21 Colo., 371, 41 Pac., 499, 31 L. R. A., 566.
>
> "(2) It is the contention of appellant that appellee was a trespasser; that the wire in controversy was not a nuisance calculated to attract small children, and that, therefore, there can be no recovery. In other words, it is appellant's contention that, if it is liable to appellee for the injuries complained of, it must be upon the theory laid down in what is termed the 'turnable cases.' It is not the law, as assumed by appellant, that one who

maintains premises on which a dangerous thing is suffered to exist is not liable for injuries thereby resulting to children, unless such instrumentality is what is termed an 'attractive nuisance.' In 1 Thompson Neg., 944, the author in discussing the liability to children of one who suffers a dangerous agency to exist on his premises, correctly states the law as follows:

"'Although the dangerous thing may not be what is termed an attractive nuisance—that is to say, may not have an especial attraction for children by reason of their childish instincts—yet where it is so left exposed that they are likely to come in contact with it, and where their coming in contact with it is obviously dangerous to them, the person so exposing the dangerous thing should reasonably anticipate the injury that is likely to happen to them from its being so exposed, and is bound to take reasonable pains to guard it so as to prevent injury to them." * * *

"It follows that if in the case at bar the improperly insulated wire, constructed, as it was, through the branches of the small tree, was obviously dangerous to persons coming in contact therewith, and if it can be said that appellant should reasonably have anticipated that children in their play would climb into the tree, and thus be exposed to the danger, then appellant would be liable to appellee for the injuries sustained, even though appellee was at the time a trespasser. It is not, therefore, necessary to decide whether appellee was or was not a trespasser at the time he was injured.

"The question presented by this appeal, though one of first impression in this State, has frequently been determined by the courts of appeal in other jurisdictions. The conclusion reached by such courts, which conclusion we approve, is well stated in a valuable text

on the law of electricity (Curtis Law of Electricity, Sec. 512) in the following language:

"'An electric company, maintaining a dangerous wire through or near a tree, is bound to anticipate that persons may lawfully climb the tree, and it is required to exercise due care to prevent injury to such persons from its wire. * * * The courts recognize that children are apt to climb trees, and impose upon electric companies the burden of using due care to keep their high tension wires insulated in places where children when climbing a tree, will come in contact with them.'

"We hold that under the facts set forth in appellee's complaint, and as shown by the evidence in this cause, the appellant should have anticipated that children would climb into the tree, through the branches of which it had stretched its wire, and that the maintenance of such wire with defective insulation was a breach of duty for which it was answerable to appellee in damages. Williams *v.* Springfield Gas & Electric Co., 274 Mo., 1, 202 S. W., 1; Temple *v.* McComb City Electric Co., 89 Miss., 1, 42 South 874, 11 L. R. A. (N. S.), 449, 119 Am. St. Rep., 698, 10 Am. Cas., 924. See also Thompson *v.* Tilton Electric etc., Co., 77 N. H., 92, 88 Atl., 216."

Other cases in point and reaching the same conclusion are *Temple* v. *McComb City Electric Light and Power Co.* (1907), 89 Miss., 1, 42 So., 874; *Daltry* v. *Media Electric Light & Heat & Power Co.*, (1904), 208 Pa. St., 403, 57 Atl., 833; *Talkington* v. *Washington Water Power Co.* (1917) 96 Wash., 386; *Williams* v. *Gas & Electric Co.* (1918) 274 Mo., 1.

In the case of *Graves* v. *The Washington Water Power Co.* (1906) 44 Wash., 675, 87 Pac., 956, relied upon by defendant (Petitioner's brief, pp. 16-

17), it is true that the Court denied a recovery to a boy who climbed the steel frame of a bridge in search of birds' nests and came in contact with the defendant's exposed wires attached to the steel support. Because of the coincidence that in this case, like the instant cases, the plaintiff was climbing a bridge in search of birds' nests, one is likely to assume that this decision is an authority against the contentions of the plaintiffs herein. But a careful examination of the facts and decision in that case reveals that the case is clearly distinguishable.

In the Graves case the Court expressly declared (p. 608):

> "The evidence does not show that appellant had actual knowledge of boys climbing these piers; nor that there was such an amount of climbing near the wires as would impute knowledge to it thereof."

Furthermore in the subsequent case of *Talkington* v. *Washington Water Power Co.* (1917), 96 Wash., 386, the same Court allowed a recovery where the plaintiff, a child ten years old, had climbed upon the roof of a grain warehouse and there came in contact with the live wire maintained by the defendant which passed over the roof of the storehouse, it appearing, as stated by the Court, that "boys of the town had been in some degree in the habit of playing on the roof of the lean-to and also on the roof of the main building on that side for some time previous to the time William Talkington received his injuries."

Counsel for the defendant in that case, as does the defendant in the cases at bar, relied upon the decision in *Graves* v. *Washington Water Power Co.* referred to above. But the Court distinguished

the *Graves* case by pointing out that in that case there was no evidence which showed that boys had ever been known to climb the bridge piers.

The defendant lays great stress upon the infant plaintiff's testimony about pigeons' nests and pigeons. As a matter of fact, the evidence shows that the primary attraction was the bridge and defendant's strut, with its beams and trellis work on which the children were accustomed to play follow-the-master, tag and other childish games. The point is not material, however, as it makes no difference that the plaintiff may have been partly motivated by the desire to search for pigeons' nests in the framework of the bridge. The evidence is uncontradicted that defendant knew that children were in the habit of climbing this bridge, whatever may have been their motive, and were therefore likely to come in contact with its wire, and hence the sole question was whether they were negligent in not anticipating and taking reasonable precautions to prevent the kind of injury which the plaintiff sustained.

FOURTH POINT.

The remaining contentions of the defendant with reference to the essentials of the attractive nuisance doctrine are unsound.

The defendant's contention that in order to make out a case under the attractive nuisance doctrine, it is necessary for the plaintiff to show that the particular instrumentality which caused the injuries was easily accessible, finds no support whatsoever in the authorities.

In those jurisdictions where the attractive nuisance doctrine has met with approval, it has been

repeatedly held that the mere fact that the children found a lurking danger difficult of approach, even though coupled with the fact that the child by his own deliberate act attempts what to an adult would be obviously dangerous, is immaterial. These cases also hold uniformly that the plaintiff is not in any way required to make proof of any license or invitation to the child to come upon the premises or structure where the danger exists. The important circumstance, according to the authorities, many of which have already been discussed at length in the foregoing part of this brief, is not whether the approach is easy and safe, or whether the child acted deliberately or not, or whether the child was invited on the premises, but whether in view of the evidence it is likely that children will be attracted to the place where the dangerous thing or situation is being maintained.

The record in this case is full of evidence to the effect that children had been in the habit of playing about the bridge, that they were constantly climbing upon the girders and trellis work and that they had on many occasions climbed upon the very strut on top of the bridge to which the defendant's wires were affixed. Defendant's own evidence shows conclusively that it had notice of this fact and that it anticipated that these boys might be injured by coming in contact with this wire.

Defendant's contention that it is not liable because its wire was not easily accessible is conclusively refuted by the following cases: *Robertson* v. *Rockland Light & Power Co.* (1919), 187 App. Div., 720; *Edwards* v. *Kansas City* (1919), 104 Kan., 681; *Electric Light Co.* v. *Healy* (1902), 65 Kan., 798; *Ft. Wayne & Northern Indiana Traction Co.* v.

Stark (1920), 127 N. E., 460; *Temple* v. *McComb City Electric Light & Power Co.* (1907), 89 Miss., 1; *Talkington* v. *Washington Water Power Co.* (1917), 96 Wash., 386; *Williams* v. *Gas & Electric Co.* (1918), 274 Mo., 1.

The above cited cases, which vary considerably as to the facts, are all cases where a recovery under the attractive nuisance doctrine was sustained although the children had climbed telegraph poles, trees, bridges, and warehouses, and had come in contact with wires affixed thereto. In each of these cases the danger was neither close to the ground nor access thereto easy and safe.

It is also worthy of note that in none of these cases did the court regard the deliberate act of the child in attempting to make a perilous climb of the pole, tree, warehouse or bridge, as severing the casual connection between the defendant's negligence and the plaintiff's injury.

The contention of defendant, made on page 26 of its brief, that because the evidence shows that the wire was maintained pursuant to the prevailing practice, the plaintiff is therefore debarred from recovery as a matter of law, is unsound. While it is not denied that evidence that the defendant maintained the wire in question pursuant to the prevailing practice, is proper evidence to be considered by the jury upon the question of negligence, it is not conclusive because it is possible that in a community the prevailing practice may be a negligent one (see, *C. M. & S. R. R. R.* v. *Moore*, 166 Fed., 663). Furthermore the failure to insulate or otherwise guard wires at other points or bridges along the defendant railroad may not constitute negligence whereas the failure to insulate

or otherwise guard the wires at the particular bridge in question, in view of the attendant circumstances, may constitute negligence.

FIFTH POINT.

The defendant's duty in the premises was in no sense diminished by Section 93 of the Railroad Law of New York.

The defendant urges on page 15 of its brief that inasmuch as Section 93 of the Railroad Law of New York imposes upon a Railroad Company the duty of keeping the frame work and abutments of its overhead bridges in repair, that this duty is exclusive, and that consequently, and by reason of the said statute, the railroad is excluded from all other duties toward the public with reference to this bridge.

The plaintiffs in these cases do not contend that the railroad has been delinquent in keeping the frame work and abutments of the bridge in repair as required by Section 93 of the Railroad Law of New York, but rather that it has failed to comply with the duty which it owed to the plaintiffs to take reasonable precautions with reference to its live wires so that such injuries as the infant plaintiff suffered might have been avoided. On the subject of the care and maintenance of the wires, Section 93 of the Railroad Law is entirely silent.

There is not a single word in the statute to justify the entirely unwarranted assumption by the defendant that the statute was intended to limit the duties of the defendant with reference to the bridge as a whole. Indeed, the mere reading of Section 93 makes it abundantly plain that the

statute was merely intended to declare certain affirmative duties and is in no sense a declaration that the enumerated duties are exclusive and that having complied therewith, the railroad may entirely disregard duties of every name, nature and description theretofore existing and arising by principles of common law.

Were the contention of the defendant sound in this respect, it might negligently run its live wires along the very roadway of the bridge, or carelessly leave a package of dynamite or some other dangerous object on or near the roadway of the bridge, without becoming liable to a person injured by such negligence.

As the language of the statute plainly indicates, it was intended to state the duties of the defendant with respect to the maintenance of "*the frame work of the bridge and its abutments*" and does not purport to affect directly or indirectly the duties or obligations of the defendant in any single other respect.

SIXTH POINT.

It is well settled that the question of liability for negligence when not modified or regulated by statute, is one of general common law and the Federal Court is not bound to follow the decisions of the State Court. Furthermore the New York decisions sustain the judgments in these cases.

It has been repeatedly held by this Court that the Federal Courts are not bound to follow the decisions of State tribunals with respect to questions of general common law not affected by State

statutes, except as to rights and titles to things having a permanent locality, such as the rights and title to real estate and other matters immovable and intraterritorial in every nature and character. *Swift* v. *Tyson* (1842), 16 Peter, 1. Specific decisions have applied this rule to negligence cases. *Gardner* v. *Michigan Central Railroad Co.*, 150 U. S., 349; *Railroad Co.* v. *Lockwood*, 17 Wall., 353; *Hough* v. *Railway Co.*, 100 U. S., 213. See 22 Columbia Law Review 77 for a discussion of recent decisions applying the rule.

The case of *Snare & Triest Co.* v. *Friedman*, 169 Fed., 1, cited in petitioner's brief, page 28, and so strongly relied upon by it would seem to be an authority directly supporting the contention of the plaintiffs on this point. (To the same effect see *Chesko, et al.* v. *Delaware & Hudson Co.*, 218 Fed., 804.) In the *Snare & Triest* case, the Federal Court allowed a recovery under the attractive nuisance doctrine, notwithstanding the fact that the highest court of the State in which the case arose had denied a recovery under identically the same facts. In that case the facts were that the defendant piled certain heavy beams on the sidewalk in front of a lot, which it had a right to do. It appeared that the beams had been piled in an insecure manner. The plaintiff, a child of tender years, was accustomed to play with other small children in the street near such piles and they frequently climbed or sat upon the same. The plaintiff and other children playing upon the pile caused it to fall, and the plaintiff was struck by it and injured.

Two actions were brought against the defendant in the Supreme Court of New Jersey, one by the plaintiff's father and the other by the plaintiff,

both complaints charging the defendant with negligence. The plaintiffs obtained judgments in both actions. In the judgment in the case of the father, a writ of error was sued out by the defendant from the Court of Errors and Appeals of the State of New Jersey and in the child's case the judgment *nisi* being entered, a rule to show cause why the verdict should not be set aside was granted returnable before the New Jersey Supreme Court. The father's case was duly argued before the New Jersey Court of Errors and Appeals and the judgment appealed from was finally reversed (*Friedman* v. *Snare & Triest Co.*, 71 N. J. Law, 605). The ground of this reversal, as stated in the opinion of the Court, was that the defendant owed no duty to children of tender years to whom, to its knowledge, these piles of beams might be attractive for playing upon, to keep them in a reasonably safe condition other than it owed to those who were *sui juris*. It was accordingly held that the child was a trespasser upon these materials of the defendant and that for the injury suffered by her as such, no cause of action or recovery could accrue to her father.

After this judgment of the Court of Errors and Appeals in the case of the father, as was inevitable, the rule to show cause why the new trial should not be granted in the case of the infant plaintiff against the same defendant was made absolute by the Trial Court, and the suit was thereafter discontinued by the plaintiff and a new action was brought in behalf of the child in the Federal Court. At the trial in the Federal Court upon substantially the same evidence as that adduced in the State Court, the plaintiff obtained a judgment from which the defendant appealed.

When the case was before the Circuit Court of Appeals, the defendant contended, as does the defendant now contend in the case at bar, that the Federal Court was bound to follow the decision of the highest court of the State which had repudiated the so-called "attractive nuisance" or "turntable" doctrine. The Circuit Court of Appeals after pointing out that this question was one of general common law, decided that the Federal Court was free to form its own independent judgment as to what were the common law rights of the plaintiff *and it was not bound to follow the adverse decision of the Court of Errors and Appeals on identically the same facts.*

While it is true the Court intimated, by way of *dictum,* that as a matter of judicial comity, the Federal Court might bow to a line of decisions in the State Courts so uniform and well settled and extending through so long a time, as to establish a rule of conduct "which it would be wrong to disturb," there is no such uniform and well settled line of decisions in New York unfavorable to the plaintiffs in the cases at bar. On the contrary the New York decisions uphold the recovery by the plaintiffs in the instant cases.

It may be interesting to trace the development of the law on this question in the New York State courts. The Court of Appeals in *McAlpin* v. *Powell,* 70 N. Y., 126, criticized, and in *Walsh* v. *Fitchburg Railroad Co.,* 145 N. Y., 301, decided, that the so-called turntable doctrine was not applicable to a railroad maintaining a turntable on *strictly private property.*

In the case of *Johnson* v. *City of New York,* 208 N. Y., 77, cited in defendant's brief, pp. 27-29, the Court approved the decision in *Walsh* v. *Fitch-*

burg Railroad Co., 145 N. Y., 301, but conceded that the rule of that case was not applicable to a similar situation *in a public street*, and the decision for the defendant was expressly based upon "the absence of evidence tending to show that the defendant was chargeable with notice of some special danger to children in the conditions which existed" (see p. 83 of the opinion).

Accordingly the Appellate Division in the recent case of *Robertson* v. *Light & Power Co.*, 187 App. Div., 720, decided that the plaintiff, a boy eleven years of age, might recover for injuries caused by coming in contact with an uninsulated wire maintained by the defendant on a pole in the public highway, he having climbed said pole by means of steps which were maintained near the ground. As stated by the Court in that case (p. 728):

> "Counsel for the Power Company relies on *Walsh* v. *Fitchburg Railroad Co.* (145 N. Y., 301), as holding that in this State there is no liability to a trespasser for the maintenance on one's own land of a so-called nuisance attractive to children, such as a turntable, and he argues that the pole was on the private property of his client, and that, therefore, the plaintiff in climbing the pole was a trespasser, and that doctrine exonerates the power company from liability. *I think there is a material difference between trespassing upon private premises and using private property left unguarded and unattended either temporarily or permanently in a public highway* (See *McAlpin* v. *Powell*, 70 N. Y., 126; *Beck* v. *Carter*, 68 *id.*, 283; * * *. (Italics ours.)

The evidence of defendant's negligence in the *Robertson* case was not nearly so strong as in the

instant cases and yet the Appellate Court held it was error to dismiss the complaint.

This is the latest expression of the New York Courts as to the law of that State, in a case like the one at bar. There is no decision of the Court of Appeals to the contrary.

In the earlier decision of *Freeman* v. *Brooklyn Heights R. R. Co.*, 54 App. Div., 596 (see Petitioner's Brief, p. 29), the plaintiff was injured by coming in contact with a guard wire which was intended to be a dead wire and defendant was not shown to be responsible for the fact that at the time of the accident it had in some undisclosed manner become charged with electricity. The following excerpt from the opinion of the Court makes this point clear (p. 598):

> "The alleged negligence of the defendant is predicated upon the fact inferable from plaintiff's evidence that the guard wire was charged with electricity at the time of the contact with the boy, but the evidence is wholly lacking to show that this was due to any negligence on the part of the defendant."

Furthermore, as pointed out in the *Robertson* case (p. 729):

> "The case of *Freeman* v. *Brooklyn Heights Railroad Co.* (54 App. Div., 596), is not in point, for there the decision was placed mainly upon the ground that the wire with which the plaintiff came in contact was intended to be a dead wire, and defendant was not shown to be responsible for the fact that at the time

> of the accident it had in some undisclosed manner become charged with electricity * * *."

The other New York cases cited in defendant's brief, page 29, are all distinguishable in that the alleged dangerous thing was maintained upon *strictly private property* and thus came within the rule of *Walsh* v. *Fitchburg Railroad Co.*, 45 N. Y., 361.

If it be said that the decision in the *Robertson* case is inconsistent with the decision in the *Freeman* case, as to the law of New York, it follows that with the Appellate Divisions of the First and Second Departments disagreeing as to what is the law of New York, it cannot be said that the decisions in the State courts are so uniform and well settled and extending through so long a time as to establish a rule of conduct "which it would be wrong to disturb" and, therefore, the Federal Court is free to exercise its independent judgment in declaring what are the common law rights of the plaintiffs in the case at bar.

In this connection it is not amiss to call attention to the fact that the plaintiffs herein, relying upon their right to recover under the New York decisions, commenced their actions in the Supreme Court of New York. The defendant removed the cases to the Federal Court. (See Petitioner's Brief, p. 5.) If the New York decisions are so favorable to defendant, as stated in its brief (see Petitioner's Brief, p. 29), it is difficult to understand why defendant removed the cases to the Federal Court.

CONCLUSION.

The judgments should be affirmed, with costs.

Dated, New York City, April 7, 1922.

Respectfully submitted,

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